

From: ronc@hal-pc.org@inetgw
To: Microsoft ATR
Date: 1/27/02 10:35pm
Subject: Microsoft Settlement

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

UNITED STATES OF AMERICA, |
Plaintiff, |
vs. | Civil Action No. 98-1232 (CKK)
MICROSOFT CORPORATION, |
Defendant. |

STATE OF NEW YORK ex. Rel. |
Attorney General ELIOT |
SPITZER, et al. |
Plaintiffs, |
vs. | Civil Action No. 98-1233 (CKK)
MICROSOFT CORPORATION, |
Defendant. |

May it please the Court:

I am writing to the Court as a concerned citizen and member of the Texas Bar who is also an Adjunct Professor of Law (Computer Law) at South Texas College of Law in Houston, Texas.

I have observed the proceedings of the Microsoft Antitrust case and now, under the provisions of the Tunney Act, I come before the Court and pray that the Court considers the following remarks regarding the Settlement between the United States Department of Justice and Microsoft Corporation (the "Settlement"), to wit:

1. Microsoft has achieved its monopoly through careful manipulation of the network effect. The network effect has been discussed in other

documents now before the court. Put simply, the network effect is present when software developers create software for a particular platform which attracts users. More users attract more developers who develop more programs which attract still more users, and so on.

The critical aspect of the network effect is communication. The core function of a network, after all, is the transfer of information from one entity to another. Communication on a network is accomplished through various means, including protocols (such as TCP/IP), formats (such as the .doc format for Microsoft Word documents), and application programming interfaces ("API's"). Microsoft has purposefully devised formats and protocols that are difficult to decipher and thus difficult for competitors to create software that is interoperable with Microsoft's products, thereby encouraging users to avoid non-Microsoft products.

Microsoft adroitly exploited the network effect to protect and extend its monopoly, in an illegal manner, by careful selection, protection, and imposition of proprietary communication formats, protocols, and API's. Microsoft protects its formats and protocols with abusive copyright and patent legal actions against competitors.

2. Because Microsoft illegally maintains its monopoly by manipulation of the network effect, any remedy imposed on Microsoft must address Microsoft's ability to manipulate the network effect. Competition cannot be restored unless and until Microsoft is precluded from manipulating the network effect in an illegal manner that maintains or raises the barrier of entry for competitors.

The Settlement is completely silent as to formats, and is almost completely silent as to protocols and API's. Moreover, where the settlement is not silent, the loopholes that have been afforded to Microsoft will render those portions of the remedy impotent.

For example, in Part III (Prohibited Conduct) of the Settlement, Microsoft need only provide an API set for Windows XP, Service Pack 1, and only for the API's used by Microsoft middleware. What if Microsoft declares, as they have in the past, that Internet Explorer is a part of the operating system and not part of middleware, and thus Microsoft's API's to Internet Explorer remain unpublished. This tactic could be used for any program that Microsoft desires, and gives Microsoft the ability to circumvent the remedies of the Settlement.

3. Microsoft must not be allowed to use patents to circumvent any settlement or court sanctions. The Court should include within the remedy a provision that precludes Microsoft from asserting intellectual property rights that attenuate or otherwise defeat any provision of the

remedy.

4. Eliminate the OEM restriction. This is considered in the Settlement with the Department of Justice. However, the language used in the Settlement Agreement leaves wide latitude for Microsoft to punish OEMs for displeasing Microsoft, simply by saying that the sanctions imposed on the particular OEM by Microsoft is for another reason.

5. Portions of the Settlement prejudice Open Source software development -- Microsoft's only real competition. For example, in Part III(E), Microsoft is required to allow third parties to have access to the Windows Operating System Product for the "sole purpose of interoperating with a Windows Operating System Product, on reasonable and non-discriminatory terms." However, those terms struck by Microsoft would certainly include a monetary royalty, which would be prohibitively expensive for any open source project that would otherwise compete with a Windows Operating System Product.

6. There must be a "fast track" procedure for settling disputes arising from Microsoft's behavior after the Court has issued its remedy. The Court should take a cue from the dissenting nine states had appoint some type of Magistrate who can make decisions and impose sanctions on Microsoft before the damage is done. Microsoft has a well established history of delaying implementation of remedies until a technological circumvention for those remedies has taken hold in the market. In other words, Microsoft has in the past made technological changes in their products that defeat conduct remedies and used tactical legal maneuvers to delay rescission of the remedy-defeating conduct until it is too late for the market restore the previous level of competition.

7. What about punishment for ill-got gains? Can we allow Microsoft to break our laws over the course of many years and pay no fine? Is Microsoft to be allowed to retain the enormous sum of money (\$34 Billion USD in cash alone) that it has received through the inordinately high prices of its famously poor quality products? Is the Court going to let crime pay and provide an example to future Microsofts that violating the Sherman Act does indeed pay?

Conclusion:

As the Settlement does not address adequately Microsoft's ability to affect the network effect, and thus cannot force Microsoft to change its behavior. Moreover, there is no punishment of Microsoft for past wrongdoing, and thus the remedy does not serve as a deterrent to future

wrongdoing by Microsoft or those who would copy its behavior.
Consequently, the Settlement is not in the public interest and should be struck down by the Court.

Respectfully submitted,

Ronald L. Chichester